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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 746

MAYTE C. ROSS, PETITIONER

v.

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 11-14) is reported in 75 F. Supp. 725.

JURISDICTION

The judgment of the Court of Claims was entered February 2, 1948. (R. 14.) The petition for a writ of certiorari was filed April 16, 1948. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether Section 121 of the Revenue Act of 1942, amending retroactively Section 23(a) of the Internal Revenue Code and prior Revenue Acts, granted to petitioner the right to relitigate the very liability previously adjudicated by the Board of Tax Appeals in a case which had become final after the denial by this Court of taxpayer's petition for a writ of certiorari.

STATUTES INVOLVED

The applicable provisions of the statutes are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

The special findings of fact of the Court of Claims (R. 10-11) may be summarized as follows:

Petitioner filed her individual income tax returns for the years 1935, 1936, and 1937, and paid the taxes shown on the returns; these are not now in dispute. In each return petitioner claimed certain deductions from gross income consisting of amounts paid to her husband as manager of her properties and amounts paid for accounting and legal fees in connection with the management of such property. These deductions were disallowed by the Commissioner of Internal Revenue on the ground that they did not constitute ordinary and necessary expenses in carrying on a trade or business. The disallowances resulted in deficiencies for the years 1935, 1936, and 1937 in the respective

amounts of \$8,969.32, \$15,387.69, and \$10,889.97, which were duly asserted by the Commissioner. (R. 10.)

Petitioner appealed to the Board of Tax Appeals from the determination of the Commissioner, and on April 16, 1941, the Board (in an unreported memorandum opinion) sustained the position of the Commissioner. The decision of the Board was affirmed on January 23, 1942, by the Circuit Court of Appeals for the Third Circuit. *Ross v. Commissioner*, 125 F. 2d 767. This Court on May 25, 1942, denied taxpayer's petition for a writ of certiorari. *Ross v. Commissioner*, 316 U. S. 685. (R. 10.)

On September 2, 1941, petitioner paid the deficiencies determined by the Commissioner, together with interest thereon as follows (R. 10):

Year	Tax	Interest	Total
1935	\$8,969.32	\$2,895.24	\$11,864.56
1936	15,387.69	4,043.69	19,431.38
1937	10,889.97	2,208.43	13,098.40
Total.....			\$44,394.34

On February 18, 1943, petitioner requested the Commissioner to reopen and reconsider the disallowance of the deductions on the ground that Section 121 of the Revenue Act of 1942 granted the relief sought. The request was denied by the Commissioner by letter dated March 6, 1943, because the decision of the Board of Tax Appeals had become final. (R. 10.)

Petitioner, on July 1, 1943, filed a claim for refund of the amount paid for the year 1935, and

on July 20, 1943, filed similar claims for the amounts paid for the years 1936 and 1937. Each claim was grounded on the contention that Section 121 of the Revenue Act of 1942 was made retroactive by its specific terms and that under that section, petitioner was entitled to the deductions claimed in her returns. Petitioner's claims were rejected by letter from the Commissioner dated July 15, 1944. (R. 11.)

The deductions claimed in the instant action are the same as those considered and rejected by the Board of Tax Appeals. (R. 11.)

The Court of Claims concluded that Congress, by the enactment of Section 121 of the Revenue Act of 1942, did not mean to repeal existing statutes of limitation or Section 322(c) of the Internal Revenue Code, which gave finality to Board decisions theretofore rendered. Accordingly, the court dismissed taxpayer's petition. (R. 14.)

ARGUMENT

The original disallowance of the deductions claimed by petitioner was clearly correct under *Higgins v. Commissioner*, 312 U. S. 212, and *City Bank Co. v. Helvering*, 313 U. S. 121. Moreover, the present decision of the Court of Claims that the 1942 legislation was not intended to permit reopening of closed cases is correct and does not present any conflict.

Not only was the prior proceeding *res judicata* under accepted principles, but Section 322(c) of

the Internal Revenue Code explicitly declares that once a proceeding has been initiated in the Board of Tax Appeals (now the Tax Court), then with certain exceptions not applicable here, "no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court".

Under Section 1140 of the Internal Revenue Code (Appendix, *infra*), the decision of the Board of Tax Appeals became final on May 25, 1942, when this Court denied the petition for certiorari, and petitioner's liability, at least with respect to the deductions, for the years 1935, 1936, and 1937, became closed and may not be reopened. Cf. *Monjar v. Higgins*, 132 F. 2d 990 (C. C. A. 2); *Bankers' Reserve Life Co. v. United States*, 44 F. 2d 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *Resnik v. Welch*, 37 F. Supp. 112 (D. Mass.); *Cook v. United States*, 108 F. 2d 804 (C. C. A. 5), certiorari denied, 310 U. S. 636.

Nor is that result changed by Section 121 of the Revenue Act of 1942 (Appendix, *infra*), upon which petitioner relies. Although these provisions were intended to have retroactive effect, to the extent that tax liabilities for earlier years had not yet been closed, there certainly was no intention whatever to permit reopening of closed cases. The provisions of Section 121 do not in terms repeal or

amend Section 322(c) of the Code, and such a result should not be achieved by implication. Cf. *Posadas v. National City Bank*, 296 U. S. 497, 503; *United States v. Jackson*, 302 U. S. 628; *United States v. Borden Co.*, 308 U. S. 188.

Although the committee reports with respect to Section 121 make clear that it was intended to have retroactive effect,¹ they contain not even the slightest suggestion that closed cases were to be reopened in contravention of the bar of Section 322 of the Code. Indeed, the legislative history discloses that the new provisions were not intended to have that effect.²

¹ See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 76, 1942-2 Cum. Bull. 372, 430; S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88, 1942-2 Cum. Bull. 504, 571.

² A colloquy which ensued in the Senate Finance Committee hearings on June 23, 1942, during consideration of the Revenue Act of 1942, between Mr. John O'Brien of the Office of Legislative Counsel of the House of Representatives and Senator Brown concerning the retroactive effect of certain provisions of the act indicates quite forcefully that Section 121 was not intended to apply to closed cases. In discussing Section 116(b) and (c) and Section 137(b), which contain language similar to that of Section 121(d) and (e), Senator Brown inquired as to whether it was intended that the retroactive provisions should be applied to cases which had been closed, and the Senator was assured that no such result was intended. Later Mr. O'Brien in explaining the retroactive intent of the amendments effected by Section 121 stated (Senate Hearings, Revenue Act of 1942, 77th Cong., 2d Sess., Vol. 1, p. 50):

These series of amendments are made completely retroactive, but, Senator Brown, *only to open years.* (Italics supplied.)

That Congress was aware of the necessity or desirability of specifically providing for the application of retroactive amendments to closed cases, when such effect was desired, is appropriately demonstrated by the provisions of subdivision (c) of Section 501 of the Revenue Act of 1942, which grants additional credits for undistributed profits tax. The committee reports in commenting upon the purpose and effect of the provisions of this subdivision are specific

The decision below is in harmony with the only cases involving the issue here presented. *Merrill v. United States*, 152 F. 2d 74 (C. C. A. 2); *White's Will v. Commissioner*, 142 F. 2d 746 (C. C. A. 3).

The circumstances surrounding *Sage v. United States*, 250 U. S. 33, upon which petitioner relies, were entirely different. It was clear from the subsequent legislation there involved that Congress intended to create a new cause of action. Here, on the other hand, the subsequent legislation merely affected preexisting liabilities to the extent that they had not yet been closed. Moreover, the *Sage* case arose prior to the creation of the Board of Tax Appeals, and neither raised nor could raise any issue as to the continued effect of provisions such as Section 322 which precludes the maintenance of the present case.

in revealing that all cases theretofore closed (except by compromise) should be reopened and granted the relief therein provided. See the identical reports of the Ways and Means Committee of the House (H. Rep. No. 2333, *supra*, p. 171) and of the Senate Finance Committee (S. Rep. No. 1631, *supra*, p. 247).

CONCLUSION

The decision below is correct and there is no conflict. There is no occasion for review by this Court. The petition should be denied.

Respectfully submitted,

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May 1948.

APPENDIX

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

* * * * *

(26 U. S. C. 1940 ed., Sec. 322.)

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL. The decision of the Board shall become final—

* * * * *

(b) *Decision affirming or petition for review dismissed.*—

* * * * *

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

* * * * *

(26 U. S. C. 1940 ed., Sec. 1140.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 121. NON-TRADE OR NON-BUSINESS DEDUCTIONS.

(a) *Deduction for expenses.*—Section 23(a) (relating to deduction for expenses) is amended to read as follows:

* * * * *

“(a) *Expenses.*—

* * * * *

“(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the

management, conservation, or maintenance of property held for the production of income."

* * * * *

(d) *Taxable years to which amendments applicable.*—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

(e) *Retroactive amendment to prior revenue Acts.*—For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment. (26 U. S. C. 1940 ed., Supp. V, Sec. 23.)